

**A Majlis Peguam Malaysia & Ors v Raja Segaran a/l
Krishnan**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-75 OF 2000
RICHARD MALANJUM, HASHIM YUSOFF, TENGKU BAHARUDIN SHAH
MAHMUD JJCA
24 SEPTEMBER 2004

C *Civil Procedure — Parties — Locus standi — Association of persons proposing a course of action — Individual arguing against that cause of action — Whether individual could seek injunction to prevent association from acting in breach of law — Whether special injury proven*

Constitutional Law — Judiciary — Judicial misconduct — Allegation of judicial misconduct — Discussion on judicial misconduct — Whether ultra vires Federal Constitution — Federal Constitution arts 125 & 127

D *Legal Profession — Malaysian Bar — Powers — Resolution to appoint board to make inquiries and recommendations to restore confidence in judiciary — Whether amount to contempt of court and sedition — Whether ultra vires powers of Legal Profession Act 1976 — Whether Malaysian Bar be enjoined from holding meeting to discuss such resolutions — Legal Profession Act 1976 s 42(1) (d)*

E *Tort — Defamation — Libel — Maker of statement — Whether statement contemptuous — Whether maker's intention is relevant in deciding whether statement contemptuous*

F There are five appeals all filed by the appellants and they arose from two civil suits namely S2-23-93 of 1999 ('the first suit') and S2-23-33 of 2000 ('the second suit') both filed by the respondent which will be decided together.

G The first suit was triggered by the move of the Malaysian Bar to hold an Extraordinary General Meeting 'EGM' to discuss allegations of impropriety against the then Chief Justice. The respondent, a member of the Bar initiate the first suit seeking various declaration and injunction on the ground that the EGM, and the proposed resolution were ultra vires, contemptuous and seditious. Pending the trial of the first suit the respondent filed an application for an interlocutory injunction while the appellants applied for the suit to be struck out. The learned judge allowed the respondent's application and dismissed the appellants' application. The appellants appeals against both the decisions were also dismissed. Subsequently, the respondent filed an application under O 33 r 2 of the Rules of the High Court 1980 ('the RHC') for a preliminary issue to be tried and the learned judge allowed the respondent's application. And on 10 November 2003 the learned judge allowed the various declarations sought by the respondent.

I Dissatisfied with the decisions the appellants filed three separate appeals inter alia, (a) Civil Appeal W-02-75 of 2004 (Appeal 75) which is against the

judgment of the learned judge delivered on 10 November 2003; (b) Civil Appeal W-02-647 of 2000 (Appeal 647) which is against the ruling of the learned judge allowing the application by the respondent for the trial of a preliminary issue pursuant to O 33 r 2 of the RHC and (c) Civil Appeal W-02-780 of 2000 (Appeal 780) which is against the dismissal by the learned judge of the preliminary objection on the issue of secrecy of proceedings conducted by the Bar Council.

The second suit was filed as a result of two events, namely, the letter issued on or about 7 June 2000 and amended on 8 June 2000 by the then secretary of the Bar Council to all its members and the public statement purportedly released by the Chairman of the Bar Council in connection with a proposed general meeting of the Malaysian Bar. There were various declaration and injunctions sought by the respondent. An application for interlocutory injunction was also filed in relation to the second suit. It was heard by the same learned judge for the first suit. A preliminary objection was raised by the appellants but it was dismissed. The second suit still pending before the High Court.

Dissatisfied with the decisions the appellants also filed two separate appeals inter alia, (a) Civil Appeal W-02-512 of 2000 (Appeal 512) which is against the dismissal of a preliminary objection and (b) Civil Appeal W-02-521 of 2000 (Appeal 521) which is against the granting of the interlocutory injunction.

The issues for consideration were: (a) whether the actions of the Bar Council and the Malaysian Bar in calling for the EGM and the proposed general meeting were *ultra vires* the Legal Profession Act 1976 ('the LPA'); (b) whether the respondent had the *locus standi* to institute the suits; (c) whether the High Court had the jurisdiction to grant the relief sought for in the suits and/or the interlocutory applications *vis-à-vis* contempt of court and the offence of sedition; (d) whether the learned judge failed to observe any of the guidelines above before granting the interlocutory injunction; (e) whether it was correct for the learned judge not to disqualify himself from hearing the suits and applications related thereto; (f) whether the learned judge was correct in refusing to recognize s 76(2) of the LPA as providing the shield of secrecy of all proceedings conducted by the Bar Council and (g) whether O 33 r 2 the RHC properly invoked.

Held, dismissing all the appeals:

- (1) Being creatures of statute the Bar Council and the Malaysian Bar must act and conduct their affairs within the framework of the LPA. Acts or conducts beyond its parameters would be *ultra vires*. Hence, in convening the proposed EGM and the proposed general meeting to discuss allegations of impropriety against the then Chief Justice, the Bar

- A** Council and the Malaysian Bar must be able to satisfy the court that they were acting within the ambit and the parameters of the LPA. The trial judge had correctly noted that this was not the case (see para 54).
- (2) **B** There was no evidence adduced during the trial in respect of the first suit that there was a request from any quarters for the Bar Council or the Malaysian Bar as a statutory body to express their views or to act or conduct as they did. As such, the Bar Council and the Malaysian Bar were not legally entitled to claim the right or even the privilege to act or conduct as they did notwithstanding the constraints in the LPA. As to who should request for their views is of course another issue but surely it has to come from a relevant and proper authority. At the same time, **C** the appellants' contention that the sub-s 42(1)(d) is ambiguous was also rejected (see para 56).
- (3) **D** The act or conduct in convening the proposed EGM and the proposed general meeting was contrary to or undermined Arts 125 and 127 of the Constitution. Such act or conduct of the Bar Council and the Malaysian Bar was unconstitutional, and hence ultra vires the LPA (see para 58).
- (4) **E** It is inconceivable to say that the proposed EGM and the proposed general meeting would be upholding the cause of justice or to protect the public in matters touching or incidental to the law when the net effect is to 'censure' the Judiciary while permitting discussion on the conduct of His Majesty's Judges in flagrant disregard to arts 125 and 127 of the Constitution. There is much to say in support of the wisdom of art 127. And allowing an open discussion on conduct of His Majesty's Judges could amount to questioning the wisdom of the King in his selection. Further the judiciary thrives on the public confidence in the system. Openly criticizing the judiciary could bring about public misunderstanding of the system and would then produce unwarranted public misgivings (see para 61). **F**
- G** (5) The notice of 12 October 1999 and the proposed resolution of 12 October 1999 issued by the appellants were contemptuous particularly the language used in the notice of 12 October 1999 seems to suggest that it was a fact that serious allegations of impropriety have been made against certain members of the judiciary. By using the word 'understands' it was clear that the appellants, whilst insidiously suggesting a fact, yet are not taking responsibility for asserting such a fact. It is also to be noted that what amounts to contempt of court in this country is also very much a question of fact and guided by common law principles and the learned judge is correct in applying the facts and principles before him (see para 70). **H**
- I** (6) The respondent could take out an injunction to restrain the appellants to protect his own interest and if the court is satisfied that the act

- complained of could give rise to the respondent facing criminal prosecution, the respondent ought to be allowed to use injunctive measures to stop the appellants (see para 83). **A**
- (7) The element of being a member of a statutory body is vital and as a member the respondent has the right to restrain a corporation from doing ultra vires acts. Since, the proposed resolution of 12 October 1999, the holding of the proposed EGM and the proposed general meeting were ultra vires the LPA the question of locus standi of the respondent should not arise and the question of special damage in such situation plays only a minor role. It follows that there is no question of the civil court being asked to enforce any criminal law (see para 95). **B**
- (8) As a member of the Malaysian Bar the respondent would definitely have been exposed to potential prosecution for sedition and contempt had the proposed EGM and the general meeting proceeded. The fact that he was only one of the many members should not negate his standing to sue on his own to ensure that he would not be exposed to unnecessary legal complexities. The test would be the 'special damage' test and the respondent had satisfied the test (see para 97). **C**
- (9) There is no strict requirement in an application for injunction that the analysis must be systematic and perhaps erudite. Reading the judgment of the learned judge as a whole it can be said that there were serious issues to be tried such as whether the allegations were true or plain hearsay, whether there was any basis to call for the suspension of the then Chief Justice and the consequence of the acts of the appellants. Further, the learned judge did consider where the justice of the case should lie, public interest and balanced the damage that could arise if the proposed general meeting was held (see para 6–7). **D**
- (10) In determining a recusal issue the primary questions to consider should be whether there was a real danger of bias on the part of the learned trial judge and whether the allegation and the factual circumstance could have caused a fair-minded and informed bystander to entertain a fear of real danger of bias. And it would be stretching too far the principles of law enunciated on when judges and arbiters should recuse from hearing cases which involves similar issues and points (see para 120). **E**
- (11) There is no provision in the Evidence Act 1950 ('the EA') which allows a witness to rely on a statutory protection such as contained in s 76(2) of the LPA and also no expressed exclusion in s 76(2) of the LPA. Unless it is expressly excluded the provisions of the EA apply in any court proceedings as founded in s 2 of the EA. Sections 118 and 136 would have been the provisions in answer (if any objection raised) when Mr R Rajasingam former member of Bar Council was called as a witness to answer a specific question, that is, whether the motion proposed by **F**
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- A** the Bar Council was the same as the proposed resolution of 12 October 1999 to be tabled during the proposed EGM. However, this was not raised and the issue of secrecy fails (see paras 123 and 128).
- B** (12) In invoking O 33 r 2 of the RHC the issues in a case should be clear and not riddled with complexities and the facts should not be in dispute. Where the issues on point of law to be decided involve the consideration of facts, resort to O 33 r 2 of the RHC is inappropriate. It is undesirable to resolve such issues on a purely hypothetical state of facts. Further, in the court below the second appellant was conceding to the approach taken by the respondent in proceeding under O 33 r 2 of the RHC and in fact suggested the proposed question in determining the contempt and sedition issues. In addition thereto, since intention is not an element that has to be proved to establish the contempt and sedition, the appellants' contention that they might call witnesses for the purpose of establishing intention or motive is irrelevant. As such the learned judge was right in allowing the invocation of O 33 r 2 of the RHC in determining the contempt and sedition issues (see paras 135, 136, 138, 139 and 140); *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321 (refd).
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- D**

E [Bahasa Malaysia summary]

F Terdapat lima rayuan yang kesemuanya difailkan oleh perayu dan rayuan-rayuan ini berbangkit daripada dua guaman sivil iaitu S2–23–93 tahun 1999 (guaman pertama tersebut) dan S2–23–33 tahun 2000 (guaman kedua tersebut) kedua-duanya difailkan oleh responden yang akan diputuskan secara bersama.

G Guaman pertama berbangkit menerusi tindakan oleh Majlis Peguam untuk mengadakan suatu EGM bagi membincangkan dakwaan salah laku terhadap Ketua Hakim Negara pada masa itu. Plaintiff, seorang peguam dan ahli Majlis Peguam memulakan guaman pertama tersebut memohon pelbagai perintah deklarasi dan injunksi atas alasan bahawa EGM dan resolusi yang dicadangkan adalah ultra vires, menghina dan hasutan. Sementara menunggu perbicaraan guaman pertama tersebut responden telah memfailkan satu permohonan untuk perintah injunksi manakala perayu-perayu memohon supaya permohonan tersebut dibatalkan. Hakim bijaksana membenarkan permohonan responden dan menolak permohonan perayu-perayu. Kedua-dua rayuan perayu-perayu kemudiannya telah ditolak. Seterusnya, responden memfailkan satu permohonan di bawah A 33 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk satu isu utama dibicarakan dan hakim bijaksana telah membenarkan permohonan responden. Dan pada 10 November 2003 hakim bijaksana membenarkan deklarasi-deklarasi yang dipohon oleh responden.

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Tidak puas hati dengan keputusan-keputusan tersebut di atas perayu-perayu telah memfailkan tiga rayuan yang berasingan antara lain, (a) Rayuan sivil W-02-75 tahun 2004 (Rayuan 75) adalah terhadap keputusan hakim bijaksana yang bertarikh pada 10 November 2003; (b) Rayuan sivil W-02-647 tahun 2000 (Rayuan 647) adalah terhadap keputusan hakim bijaksana yang membenarkan permohonan responden untuk membicarakan isu permulaan berdasarkan A 33 k 2 KMT dan (c) Rayuan sivil W-02-780 tahun 2000 (Rayuan 780) adalah terhadap keputusan hakim bijaksana yang menolak bantahan permulaan terhadap isu kerahsiaan prosiding yang telah dilaksanakan oleh Majlis Peguam.

Guaman kedua telah difailkan akibat daripada dua peristiwa, iaitu, surat yang dikeluarkan pada atau 7 Jun 2000 dan kemudiannya dipinda pada 8 Jun 2000 oleh setiausaha Majlis Peguam pada masa itu kepada kesemua ahli-ahlinya dan pernyataan awam yang kononnya dikeluarkan oleh Pengerusi Majlis Peguam yang berkaitan dengan mesyuarat am Majlis Peguam yang telah dicadangkan. Responden memohon pelbagai deklarasi dan injunksi. Satu permohonan untuk injunksi turut difailkan oleh responden. Permohonan ini turut didengar oleh hakim bijaksana yang mendengar guaman pertama tersebut. Satu bantahan awalan dibangkitkan oleh perayu-perayu akan tetapi bantahan awalan tersebut telah ditolak oleh perayu. Guaman kedua masih menunggu untuk perbicaraan di Mahkamah Tinggi.

Tidak puas hati dengan keputusan-keputusan tersebut perayu-perayu memfailkan dua rayuan yang berasingan antara lain, (a) Rayuan sivil W-02-512-00 (Rayuan 512) adalah terhadap keputusan hakim bijaksana yang menolak bantahan awalan dan (b) Rayuan Sivil W-02-521-00 (Rayuan 521) adalah terhadap keputusan hakim bijaksana yang membenarkan permohonan injunksi interlokutori.

Isu-isu untuk pertimbangan adalah: (a) sama ada tindakan Majlis Peguam dan Badan Peguam dalam memanggil EGM dan mesyuarat agung yang telah dicadangkan adalah ultra vires Akta Profesion Undang-Undang 1976 ("APU"); (b) sama ada responden mempunyai locus standi untuk memfailkan tindakan-tindakan ini; (c) sama ada Mahkamah Tinggi mempunyai bidang kuasa untuk membenarkan relif-relif yang dipohon dalam tindakan-tindakan ini dan/atau permohonan-permohonan interlokutori iaitu penghinaan mahkamah dan kesalahan hasutan; (d) sama ada hakim bijaksana gagal untuk memberi perhatian kepada mana-mana panduan di atas sebelum membenarkan permohonan injunksi interlokutori; (e) sama ada adalah betul untuk hakim bijaksana untuk tidak mengecualikan dirinya daripada mendengar guaman-guaman dan permohonan-permohonan yang berkaitan dengannya; (f) sama ada hakim bijaksana adalah betul apabila enggan mengiktiraf s 76(2) APU yang diperuntukkan sebagai perisai rahsia kepada segala prosiding yang dijalankan oleh Majlis Peguam dan (g) sama ada A 33 k 2 KMT tersebut adalah sesuai untuk diguna pakai.

A **Diputuskan**, menolak kesemua rayuan:

- (1) Memandangkan Majlis Peguam dan Badan Peguam adalah diwujudkan oleh suatu Akta ia hendaklah bertindak dan menjalankan segala tindak-tanduknya di bawah lingkungan APU. Perbuatan dan tindakan di luar lingkungan adalah ultra vires. Maka, dalam mengadakan EGM yang dicadangkan dan mesyuarat agung yang dicadangkan untuk membincangkan dakwaan salah laku terhadap Ketua Hakim Negara, Majlis Peguam dan Badan Peguam hendaklah memuaskan mahkamah bahawa mereka bertindak di bawah skop lingkungan APU. Hakim bicara dengan sememangnya betul dalam mengambil perhatian bahawa ini bukanlah keadaannya (lihat perenggan 54).
- (2) Tidak terdapat sebarang keterangan telah dikemukakan semasa perbicaraan khususnya guaman pertama bahawa di dalam itu terdapat satu permintaan daripada mana-mana pihak di dalam Badan Peguam ataupun Majlis Peguam yang merupakan badan berkanun untuk menyatakan pandangan mereka atau bertindak atau berkelakuan seperti mereka. Oleh itu, Badan Peguam dan Majlis Peguam tidak berhak di bawah undang-undang untuk menyatakan bahawa mereka mempunyai hak atau mempunyai keistimewaan untuk bertindak atau berkelakuan sebagaimana yang dilakukan meskipun terdapat sekatan-sekatan di bawah APU. Berkaitan dengan siapa yang perlu memohon kepada pandangan-pandangan mereka adalah satu isu yang lain tetapi sebenarnya ia adalah terjatuh di bawah pihak yang sesuai dan relevan. Pada masa yang sama, pernyataan perayu-perayu bahawa sub-s 42(1)(d) adalah kabur juga hendaklah ditolak (lihat perenggan 56).
- (3) Tindakan atau kelakuan dalam mengadakan EGM dan mesyuarat agung yang dicadangkan adalah bertentangan kepada atau memperkecil-kecilkan Perkara 125 dan 127 Perlembagaan. Tindakan atau kelakuan Majlis Peguam dan badan Peguam sedemikian tidak berperlembagaan dan dengan itu adalah ultra vires APU (lihat perenggan 58).
- (4) Tidak dapat dibayangkan bahawa EGM dan mesyuarat agung yang dicadangkan akan mempertahankan keadilan atau melindungi orang awam dalam perkara-perkara tentang atau berkaitan dengan undang-undang sedangkan kesan akhirnya adalah untuk “mengecam” badan kehakiman di samping membenarkan perbincangan tentang kelakuan hakim-hakim Yang Dipertuan Agong secara ketara tidak menghormati Perkara 125 dan 127 Perlembagaan. Banyak boleh diperkatakan dalam menyokong kearifan Perkara 127. Dan membenarkan perbincangan terbuka kelakuan hakim-hakim Yang Dipertuan Agong boleh terjumlah kepada mempersoalkan kebijaksanaan Yang Dipertuan Agong dalam pemilihan baginda. Tambahan pula, badan kehakiman berkembang maju dalam sistemnya atas dasar kepercayaan orang awam. Mengkritik badan kehakiman secara terbuka akan menyebabkan orang awam salah

- sangka terhadap sistem keadilan dan akhirnya menghasilkan perasaan waswas di kalangan umum (lihat perenggan 61). **A**
- (5) Notis bertarikh 12 Oktober 1999 dan resolusi yang dicadangkan yang bertarikh 12 Oktober 1999 yang dikeluarkan oleh perayu-perayu adalah menghina khususnya bahasa yang digunakan di dalam notis bertarikh 12 Oktober 1999 yang mencadangkan ia adalah satu fakta bahawa dakwaan salah laku yang serius telah dibuat terhadap segolongan ahli-ahli kehakiman. Dengan penggunaan perkataan 'understands' adalah jelas bahawa perayu-perayu, secara dari dalamnya mencadangkan fakta bahawa, walaupun enggan bertanggungjawab dalam menyatakan fakta sedemikian. Adalah perlu diambil kira bahawa apa yang terjumlah kepada penghinaan di negara ini adalah persoalan fakta dan dibimbing oleh prinsip-prinsip common law dan hakim bijaksana adalah betul dalam menerima pakai fakta-fakta dan prinsip-prinsip di hadapannya (lihat perenggan 70). **B**
- (6) Responden boleh memohon perintah injunksi untuk menghalang perayu-perayu demi menjaga kepentingannya dan sekiranya mahkamah berpuas hati bahawa tindakan yang diadu yang mana akan menyebabkan responden didakwa bagi kesalahan jenayah, responden seharusnya dibenarkan untuk mengguna langkah tahanan bagi menghalang perayu-perayu (lihat perenggan 83). **C**
- (7) Menjadi ahli satu badan statutori adalah elemen yang penting dan sebagai ahli, responden mempunyai hak untuk menghalang satu perbadanan daripada melakukan tindakan yang ultra vires. Memandangkan resolusi yang bertarikh 12 Oktober 1999, mengadakan EGM dan mesyuarat agung yang dicadangkan adalah ultra vires APU maka persoalan locus standi responden tidak seharusnya timbul dan persoalan ganti rugi khas hanya memainkan fungsi kecil. Ia diikuti bahawa tiada persoalan yang mana mahkamah sivil diminta untuk menguatkuasakan undang-undang jenayah (lihat perenggan 95). **D**
- (8) Sebagai ahli Badan Peguam responden pasti didedahkan kepada kemungkinan pendakwaan untuk hasutan dan penghinaan sekiranya EGM dan mesyuarat agung yang dicadangkan itu diteruskan. Fakta bahawa responden hanya seorang daripada banyak ahli yang lain tidak patut menyangkal kedudukannya untuk membawa tindakan secara sendiri untuk memastikan bahawa responden tidak didedahkan kepada kompleksiti undang-undang yang tidak wajar. Ujiannya adalah ujian 'special damage' dan responden telah memuaskan ujian tersebut (lihat perenggan 97). **E**
- (9) Tidak terdapat keperluan yang ketat dalam permohonan untuk injunksi bahawa analisis hendaklah sistematik dan seharusnya berilmu. Pembacaan penghakiman hakim bijaksana secara keseluruhan adalah **F**
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- A** boleh dikatakan bahawa terdapat isu-isu serius patut dibicarakan seperti sama ada dakwaan-dakwaan adalah benar atau hanya dengar cakap, sama ada terdapat apa-apa asas dalam memanggil untuk penggantungan Ketua hakim Negara pada masa itu dan juga kesan tindakan perayu-perayu itu sendiri. Seterusnya, hakim bijaksana turut mengambil kira di
- B** mana keadilan kes tersebut patut wujud, kepentingan awam dan juga mengimbang ganti rugi yang akan timbul sekiranya mesyuarat agung yang dicadangkan itu diteruskan (lihat perenggan 106–107).
- (10) Dalam menentukan isu penarikan diri hakim bijaksana persoalan utama yang harus diambil kira adalah sama ada terdapat ‘real danger of bias’
- C** dipihak hakim perbicaraan yang bijaksana dan sama ada dakwaan fakta-fakta keadaan yang mana boleh menyebabkan seseorang yang berfikir adil dan bijaksana akan menganggap wujudnya ‘real danger of bias’. Dan adalah meregangkan terlalu jauh prinsip undang-undang yang telah diperuntukkan bilamana hakim dan penimbang tara patut menarik diri
- D** daripada mendengar kes-kes yang melibatkan isu-isu dan butir-butir yang sama (lihat perenggan 120).
- (11) Tidak terdapat sebarang peruntukkan dalam Akta Keterangan 1950 (“Akta”) yang membenarkan saksi untuk bergantung kepada perlindungan statutori seperti yang terkandung di dalam s 76(2) APU dan juga tidak terdapat pengecualian yang nyata di dalam s 76(2) APU. Kecuali dengan nyata dikecualikan peruntukkan Akta Keterangan adalah terpakai di mana-mana prosiding mahkamah seperti yang diperuntukkan di dalam s 2 Akta. Seksyen-seksyen 118 dan 136 merupakan peruntukan yang akan menjadi jawapan (sekiranya bantahan dibuat) apabila En R Rajasingam ahli terdahulu Majlis Peguam yang telah dipanggil sebagai saksi untuk menjawab soalan spesifik, iaitu, sama ada usul yang dicadangkan oleh Majlis Peguam adalah sama dengan resolusi yang dicadangkan pada 12 Oktober 1999 yang akan dibentangkan semasa EGM yang dicadangkan. Walau bagaimanapun,
- E** ini tidak bangkitkan maka isu kerahsiaan adalah gagal (lihat perenggan 123 dan 128).
- (12) Dalam menerima pakai A 33 k 2 KMT isu-isu dalam kes hendaklah jelas dan tidak dipenuhi dengan kompleksiti dan fakta-fakta tidak boleh dipertikaikan. Di mana, persoalan perundangan yang diputuskan melibatkan pengambilan kira fakta-fakta, penggunaan A 33 k 2 KMT adalah tidak sesuai. Adalah susah untuk menyelesaikan isu-isu seumpama tersebut melalui fakta-fakta yang berdasarkan andaian. Malah, di Mahkamah Tinggi perayu kedua turut bersetuju kepada pendekatan yang diambil oleh responden di bawah A 33 k 2 KMT dan juga telah mencadangkan persoalan yang dapat menentukan isu-isu penghinaan dan hasutan. Di samping itu, memandangkan niat bukan merupakan elemen yang perlu dibuktikan di dalam kedua-dua
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penghinaan dan hasutan, pernyataan perayu-perayu bahawa mereka berkemungkinan akan memanggil saksi-saksi untuk membuktikan niat atau motif adalah tidak relevan. Maka, hakim bijaksana adalah betul dalam membenarkan pemakaian A 33 k 2 KMT dalam menentukan isu-isu penghinaan dan hasutan (lihat perenggan 135, 136, 138, 139 dan 140); *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321 (dirujuk).

A

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Notes

For cases on *locus standi*, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3924–3981.

For cases on the judiciary, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 1660.

For cases on the powers of the Malaysian Bar, see 9 *Mallal's Digest* (4th Ed, 1999 Reissue) para 1585.

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 263–352.

C

D

Cases referred to

Advocate General v D Seshagiri Rao AIR [1966] Andhra Pradesh 167 (refd)
Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [2002] 4 MLJ 327 (refd)

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504 (refd)
Arab Malaysian Finance Bhd v Meridien International Credit Corporation Ltd London [1993] 3 MLJ 193 (refd)

E

Attorney-General v Fred Zimmerman & Ors [1986] 2 MLJ 89 (refd)
Bateman's Bay Local Aboriginal Land Council and Another v Aboriginal Community Benefit Fund Pty Ltd and Another 155 ALR 684 (refd)

F

Beevis v Dawson [1956] 3 All E R 837 (refd)
Bermuda Cablevision Ltd v Colica trust Co Ltd (PC) [1998] AC 198 (refd)
Brahma Prakash v State of UP AIR [1954] SC 10 (refd)
C Ravichandran Iyer v Justice AM Bhattacharjee & Ors [1995] 5 SCC 457 (refd)
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 (refd)

G

Crown v A Rafique & Ors IR [37] 1950 Sind 1 (refd)
DP Vijandran v Majlis Peguam [1995] 3 MLJ 576 (refd)
Gallagher v Durack [1983] 57 ALJR 191 (refd)
Garden Cottage Foods Ltd v Milk Marketing Board [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 (refd)

H

Gouriet v Union of Post Office Workers [1978] LR 435 (distd)
Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12 (refd)
Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213 (refd)
Hoole v Great Western Railway (1867) 3 Ch App 262 (refd)
Inland Revenue Commissioners v National Federation of Self-employed & Small Businesses Ltd [1982] AC 617 (refd)

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Jenkin v Phamaceutical Society of Great Britain (1921) 1 Ch D 392 (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

- A** *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & Other Appeals* [1997] 3 MLJ 23 (refd)
Locabail (UK) Ltd v Bayfield Properties Ltd & Anor [2000] 1 All ER 65 (refd)
Maju Holdings Sdn Bhd v Kamala Devi a/p Ramadass & Anor And Another Appeal [2003] 2 MLJ 36 (refd)
- B** *Malaysia Shipyard v Bank Rakyat* [1985] 2 CLJ 427 (refd)
Mohamed Ezam bin Mohd Nor & Ors v Public Prosecutor [2002] 1 MLJ 321 (refd)
Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd [2002] 4 MLJ 241 (refd)
Murray Hiebert v Chandra Sri Ram [1999] 4 MLJ 321 (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474 (refd)
Oh Keng Seng v Public Prosecutor [1980] 2 MLJ 244 (refd)
- C** *Powell v Kempton Park Racecourse* [1897] 2 QB 242 (refd)
Public Prosecutor v Oh Keng Seng [1979] 2 MLJ 174 (refd)
R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2) [1999] 1 All ER 577 (refd)
Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors [2000] 1 MLJ 1 (refd)
Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors [2004] 1 MLJ 34 (refd)
- D** *Rondel v Worsley* [1967] 1QB 443 (refd)
Simpson v Westminster Palace Hotel Co (1860) 8 HL Cas 712 (refd)
Tan Ah Chin & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633 (refd)

E **Legislation referred to**

Federal Constitution Arts 125, 127
Evidence Act 1950 ss 118, 123, 136, 162(2)
Legal Profession Act 1976 ss 41(1)(a), (e), (g), 42(1)(d), 56, 57, 76(2)
Rules of the High Court 1980 O 33
Sedition Act 1948 ss 3(1)(c), 4(1) (a)

F

YM Raja Aziz Addruse (Christopher Leong, Leo Su Chang, Ambiga Sreenevasen, Ranjit Singh, Kalvin Seet, James Kong, Gopal Sreenevasen with him) (Chooi & Co and Sivananthan) for the appellants.

DP Vijandran (DP Vijandran & Associates) for the respondent.

G

Richard Malanjum Hashim Yusoff, Tengku Baharudin Shah Mahmud JJCA:

INTRODUCTION

H

[1] There are five appeals before us. They arose from two civil suits, S2–23–93 of 1999 (‘the first suit’) and S2–23–33 of 2000 (‘the second suit’).

[2] Both suits were filed by the respondent herein as plaintiff. But in this judgment he will be referred throughout as the respondent. The defendants in the respective suits are the appellants herein and will collectively be referred to as such where appropriate in this judgment. Otherwise the appellants will be referred to by their respective names.

I

[3] As the background facts and events of these appeals are substantially interrelated we propose to briefly state them first before dealing with the issues and arguments.

THE PARTIES

[4] In the first suit the first appellant is the Bar Council, the second appellant was the former Chairman of the Bar Council being sued on behalf of all the Executive Committee members of the Bar Council including himself while the third appellant is the Malaysian Bar. The first and third appellants are bodies established under the Legal Profession Act 1976 ('the LPA').

[5] The respondent is a member of the Malaysian Bar paying an annual subscription fee of RM350 and such further sums as may be required for the various funds and projects of the Bar Council. Section 43 of the LPA made membership to the Malaysian Bar obligatory for anyone wishing to be issued with annual practicing certificate.

[6] In the second suit the first appellant is the Malaysian Bar while the other defendants who did not appeal were formerly members of the Executive Committee of the Bar Council.

Brief backgrounds of events

[7] Raja Aziz the lead counsel for the appellants in both suits briefly summarized the object and causes of the suits:

- (a) that in each of the action it sought '*to restrain the Bar Council, Malaysia, from convening and holding an Extraordinary General Meeting to discuss allegations of impropriety made against the Chief Justice who was then in office*';
- (b) that in the first suit '*the allegations were made in an amended defence filed in August 1999 in High Court Civil Suit No S2-23-43-1996*'; and
- (c) that in the second suit '*the allegations were similar, and they were reported in the press on 31 May 2000, as having been made by Datuk Dr Rais Yatim, the Minister in the Prime Minister's Department*'.

[8] These appeals relate to the decisions of the same learned High Court judge in both suits.

[9] In respect of the first suit the appeals are:

- (a) W-02-75 of 2004 (Appeal 75) which is against the judgment of the learned judge rendered on 10 November 2003 and effectively disposed of;
- (b) W-02-647 of 2000 (Appeal 647) which is against the ruling of the learned judge allowing the application by the respondent for the trial of a preliminary issue pursuant to Order 33 of the Rules of the High Court 1980 ('the Rules'); and

- A** (c) W-02-780 of 2000 (Appeal 780) which is against the dismissal by the learned judge of the preliminary objection on the issue of secrecy of proceedings conducted by the Bar Council.

B **[10]** The first suit was triggered by the move of the Malaysian Bar acting in concert with the Bar Council to call for an Extraordinary General Meeting scheduled on 20 November 1999 at 10 am at the Grand Ballroom, Renaissance Hotel Kuala Lumpur. A notice dated 12 October 1999 ('the notice of 12 October 1999') containing a proposed resolution of even date ('the proposed resolution of 12 October 1999') was thus issued. The respondent received a copy of the same. For convenience, in this judgment unless stated otherwise any reference to 'the proposed EGM' includes the aforementioned notice of 12 October 1999 and the proposed resolution of 12 October 1999.

- C**
- D** **[11]** The main purpose of the proposed EGM was to consider and to adopt if approved the proposed resolution of 12 October 1999 which read:

That the Bar Council is to forthwith bring to the attention of the appropriate authorities all relevant instances of controversy that have undermined confidence in the Malaysian Judiciary and to do all that is necessary to pursue the appointment of a Royal Commission of Inquiry to make such inquiries and recommendations as may be appropriate to ensure that confidence in the Malaysian Judiciary is fully restored.

E

[12] The reasons for tabling the proposed resolution of 12 October 1999 were stated in the notice of 12 October 1999 and in this fashion:

- F** 2 The Malaysian Bar:
- (a) understands that serious allegations of impropriety have been made against certain members of the Judiciary; and
- (b) is gravely concerned with judicial development and pronouncement in certain important branches of the law such as the law of contempt and the law of defamation, and with the administration of justice generally.

G

3 *It is the grave concern of the Malaysian Bar that by reason of these allegations, developments and pronouncements confidence in the independence, integrity and competence in the Judiciary has been undermined to the detriment of the rule of law in Malaysia.*

- H** **[13]** On 2 November 1999 the respondent wrote to the Bar Council requesting that the proposed EGM be called off. However the Bar Council did not accede to his request. Hence the respondent filed the first suit on 9 November 1999.

- I** **[14]** The prayers sought for in the first suit (as amended) were as follows:

- (a) For a Declaration that the said EGM and the said proposed resolution are ultra vires the Legal Profession Act 1976.

- (b) For a Declaration that the said EGM and the said proposed resolution constitute contempt of Court. **A**
- (c) For a Declaration that the said EGM and the said proposed resolution constitute offences under the Sedition Act 1948.
- (d) For an interim injunction to restrain the defendants either by themselves and/or their servants and/or agents from holding the said EGM on 20 November 1999; **B**
- (e) a permanent injunction to restrain the defendants either by themselves and/or through their servants and/or their agents from holding and/or causing to be held any further similar meetings with the same or similar purposes. **C**
- (f) damages;
- (g) costs;
- (h) any further and or other relief as this Honourable Court deems fit and proper to grant. **D**

[15] Pending the trial of the first suit the respondent filed an application for an interlocutory injunction while the appellants applied for the suit to be struck out. After hearing these applications the learned judge allowed the application by the respondent but dismissed the application by the Appellants. Appeals against both the decisions of the learned judge were subsequently lodged with this Court. However on 12 July 2000 both appeals were dismissed. **E**

[16] On 26 July 2000 the respondent filed an application under O 33 of the Rules for a preliminary issue to be tried. On 5 September 2000 the learned judge ordered the following issue to be tried, namely: **F**

Whether the proposed Resolution dated 12 October 1999 as contained in the Notice dated 12 October 1999 and the proposed Extraordinary General meeting on the Malaysian Bar to be held on 20 November 1999 were ultra vires the powers and objects of the Malaysian Bar under the Legal Profession Act 1976 in that:

- (a) The Resolution and Extraordinary Meeting are not within the powers and/or objects of the Malaysian Bar under the Legal Profession Act 1976 **G**
- (b) The Resolution and the Meeting and the participation of both Council and Ordinary members therein constitute Contempt of Court and/or are seditious and/or are unconstitutional. **H**

[17] In respect of the first suit there were therefore three issues to be tried before the learned Judge. In his judgment delivered on 10 November 2003 (see : *Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors* [2004] 1 MLJ 34) the learned judge answered all of them in the affirmative and subsequently gave the following reliefs to the Respondent: **I**

- (a) A Declaration that the said EGM and the said proposed resolution are ultra vires the Legal Profession Act 1976.

- A** (b) A Declaration that the said EGM and the said proposed resolution constitute contempt of Court.
- (c) A Declaration that the said EGM and the said proposed resolution constitute offences under the Sedition Act 1948.
- B** [(d) Interim injunction earlier granted on 19 November 99.]
- (e) A permanent injunction to restrain the defendants either by themselves and/or through their servants and/or their agents from holding and/or causing to be held any further similar meetings with the same or similar purposes.
- (f) Damages to be assessed by the learned deputy registrar.
- C** (g) Costs.
- D** [18] In respect of the second suit it was filed as a result of two events, namely, the letter issued on or about 7 June 2000 and amended on 8 June 2000 by the then Secretary of the Bar Council to all its members and the public statement purportedly released by the Chairman of the Bar Council in connection with a proposed general meeting of the Malaysian Bar scheduled on 23 June 2000. For convenience in this judgment in relation to the second suit any reference to the proposed general meeting includes any resolution to be tabled for discussion thereat. And the allegation or statement that prompted to convene the proposed general meeting is referred to in para 7(c) hereinabove.
- E** [19] The respondent asserted that on 12 June 2000 he wrote to the Malaysian Bar and to the Executive Committee of the Bar Council requesting that the proposed general meeting be called off and gave them 48 hours to respond.
- F** [20] However vide a faxed letter dated 13 June 2000 from the Secretary of the Bar Council the respondent was informed that the proposed general meeting would proceed as scheduled.
- G** [21] And on 15 June 2000 the Executive Committee of the Bar Council caused to be issued a notice on the proposed general meeting by way of an advertisement in the newspapers.
- [22] Hence the second suit, which until to-date is still pending for trial, was filed on 19 June 2000 seeking for the following relief:
- H** (a) For a Declaration that the purported notice is wrongful, illegal, invalid, null and void and/or contrary to the Legal Profession Act;
- (b) For a Declaration that the convening of the said general meeting is wrongful, illegal, invalid, null and void and/or contrary to the Legal Profession Act;
- I** (c) For a Declaration that the said general meeting and the said proposed resolution and the publication of the purported notice in the press are ultra vires the Legal Profession Act 1976;

- (d) For a Declaration that the said public statement and the said proposed resolution and the said proposed general meeting and the publication of the purported notice in the press constitute contempt of Court; **A**
- (e) For a Declaration that the said public statement and the said proposed resolution and the said general meeting and the publication of the purported notice in the press constitute offences under the Sedition Act 1948; **B**
- (f) For an interlocutory injunction to restrain the defendants either by themselves and/or their servants and/or agents from holding the said general meeting on 23 June 2000;
- (g) a permanent injunction to restrain the defendants either by themselves and/or through their servants and/or their agents from holding and/or causing to be held any further similar meetings with the same or similar purposes that constitutes contempt and/or an abuse of power; **C**
- (h) damages;
- (i) costs; **D**
- (j) any further and or other relief.

[23] An application for interlocutory injunction was also filed in relation to the second suit. It was heard by the same learned Judge for the first suit. A preliminary objection was raised by the appellants but that was dismissed. Civil Appeal W-02-512-2000 (Appeal 512) is an appeal to this Court against that dismissal. And after hearing the parties the learned judge ruled thus: **E**

I therefore grant the plaintiff an order injunctiong the 1st defendant or its servants or agents from convening the extraordinary general meeting fixed for 23 June 2000. I also order that the 1st defendant to pay the plaintiff the costs of this application to be taxed. **F**

[24] Civil Appeal W-02-521 of 2000 (Appeal 521) herein is an appeal against the granting of the interlocutory injunction.

The hearing **G**

[25] At the outset of hearing of these appeals some confusion arose in that the appellants in Appeal 512 intimated their intention to withdraw it contending that the issues therein are also in Appeal 521. However learned counsel for the respondent asked for costs. That halted the appellants from formally withdrawing the same. As such all the appeals remained before this Court. **H**

The issues for determination

[26] Raja Aziz submitted that the grounds relied upon by the respondent in the first suit and partly in the second suit were: **I**

- (1) that the proposed resolutions to be discussed at the Meeting were *ultra vires* the Legal Profession Act 1976;

- A** (2) that the meeting and the proposed resolutions constituted contempt of court;
(3) that the meeting and the proposed resolutions constituted offences under the Sedition Act 1948.

[27] And Raja Aziz listed the issues of law raised in those grounds as follows:

- B** (1) whether the plaintiff (respondent herein) had the *locus standi* to institute the proceeding or, by way of corollary, whether the court had the jurisdiction to entertain the action;
- C** (2) whether the court had the jurisdiction to make the declarations prayed for; and
(3) whether the court had the jurisdiction to restrain the convening and holding of the Meeting (ie the proposed EGM).

[28] In relation to Appeal 647 Raja Aziz submitted that although the learned judge allowed the first suit to be tried on preliminary issue under O 33 he nevertheless erroneously proceeded to allow witnesses to be called.

[29] Dato' Loh Siew Cheang learned counsel for the appellants in Appeal 512 which was related to the second suit, submitted on the failure by the learned judge despite objection lodged to recuse himself from hearing the application. Learned counsel maintained that the issue remained a live issue.

[30] And Ms Ambiga Sreenevasan learned counsel for the appellants in Appeal 780 dealt with the issue of secrecy of proceedings conducted by the Bar Council citing s 76(2) of the LPA.

[31] Mr DP Vijandran learned counsel for the respondent in his response to the respective submissions of learned counsel for the appellants addressed each of the issues raised. He also submitted on the jurisdiction and the principles of law the High Court must consider before granting an interlocutory injunction. In respect of Appeal 521 learned counsel highlighted the fact that there was no appeal on the issues now raised. Hence he argued that this Court should only be concerned with whether the interlocutory injunction was correctly given. Indeed Raja Aziz was also of the same mind when he said that 'ultra vires point was not considered at all by the learned judge; and there being no cross-appeal against the decision of the High Court, that issue does not arise in Appeal 521'.

[32] Anyway, in summary the main issues to be determined in these appeals are thus:

- (i) *ultra vires*—whether the actions of the Bar Council and the Malaysian Bar in calling for the proposed EGM and proposed general meeting were *ultra vires* the LPA;
- (ii) *locus standi*—whether the respondent had the *locus standi* to institute the suits;

- (iii) whether the High Court had the jurisdiction to grant the relief sought for in the suits and/or the interlocutory applications *vis-à-vis* contempt of court and the offence of sedition; **A**
- (iv) recusal point—whether it was correct for the learned judge not to disqualify himself from hearing the suits and applications related thereto; **B**
- (v) secrecy—whether the learned judge was correct in refusing to recognize s 76(2) of the LPA as providing the shield of secrecy of all proceedings conducted by the Bar Council; and
- (vi) the application of O 33 of the Rules. **C**

Appeals 75 and 521

[33] We propose to deal with Appeal 75 and Appeal 521 together in relation to the first three issues in seriatim and thereafter consider the other appeals including W-02-647-00. Initially we were inclined to deal first with the question of locus standi since it might be the determining factor in these appeals. But on further consideration we find that the three issues are very much intertwined. Thus, it would be quite pointless to deal with that issue if in the first place the act and conduct of the appellants complained of by the respondent could not be held to be ultra vires the LPA, contemptuous or seditious. We resolve therefore to deal with these three issues before addressing the question of locus standi of the respondent. **D**

Ultra vires

(i) The Contentions **E**

[34] On the issue of ultra vires Raja Aziz submitted three basic points for both the Appeals 75 and 521. The first is the role of the Bar under common law in the administration of justice. The second is on the legal implications of Arts 125 and 127 of the Federal Constitution ('the Constitution') and the third is on s 42(1)(d) of the LPA. He did not agree that the issues of contempt and sedition should be part and parcel of the point on ultra vires. He argued that just because a statement or an act might be contemptuous or seditious should not render the same to be ultra vires. And he went to ask whether the Bar should stand idly when judges misconduct themselves. **F**

[35] To elaborate his first point Raja Aziz submitted that 'it has long been acknowledged and emphasized by eminent judges that members of the Bar and judges are each an integral part of the proper administration of justice.' He cited the case of *Beevis v Dawson* [1956] 3 All ER 837; *Rondel v Worsley* [1967] 1 QB 443; *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577. **G**

- A** [36] And he went on to say that members of the Bar are ‘expected to have competency and integrity and to act without fear or favour in representing their clients’ cause subject only to their duty to justice’ while judges’ tasks ‘are even more onerous in that in addition to being competent independent and impartial, they must be persons of impeccable integrity because if their integrity is suspect, their independence and impartiality will equally be suspect’. Learned counsel also submitted that such expectation of the Judiciary and standard of conduct and behaviour expected of judges are found in the ‘Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region’ as well as in ‘the Bangalore Principles of Judicial Conduct’.
- C** [37] To paraphrase his first point, learned counsel seemed to suggest that members of the Bar are equally responsible to ensure for an independent judiciary and proper administration of justice. His complaint therefore is that in such context the learned judge failed to appreciate the reasons for the convening of the proposed EGM and the proposed general meeting.
- D** [38] In passing Raja Aziz pointed out that the learned judge appeared to have two distinct views on the statements which respectively prompted the filing of the two suits. He said that in the first suit the learned judge did not question the accuracy of the statement yet the calling for the proposed EGM was ruled ultra vires the LPA. But in the second suit (Appeal 521) Raja Aziz said that the learned judge ruled to be hearsay the statements attributed to Dato’ Dr Rais Yatim which was the reason for the calling of the proposed general meeting.
- E**
- F** [39] And specific to Appeal 75 on the issue of ultra vires learned counsel argued that the Bar Council by reason of its role in the administration of justice was not ‘acting ultra vires the LPA in calling for the EGM on each of the two occasions when the allegations against the Chief Justice surfaced’.
- G** [40] Learned counsel also submitted on the ambit and implications of Arts 125 and 127 of the Constitution and the construction of s 42(1)(d) of the LPA being an ambiguous provision. He contended that the two constitutional articles should not be interpreted as having precluded any discussion on the conduct of judges.
- H** [41] In respect of Appeal 521 on the same issue learned counsel contended that the learned judge misdirected himself when he ruled that ‘there was no need for him to ask the plaintiff to even go into the merits of his application’ after concluding that ‘there is no basis for the Malaysian Bar to contend that there were allegations made by Datuk Dr Rais Yatim’ by reason of the same being hearsay evidence. Learned counsel thus submitted:
- I** (i) that it was for the respondent ‘to satisfy the court that the Bar Council was not entitled in law to convene’ the proposed general meeting on the basis of Dato’ Dr Rais Yatim’s reported statements;

- (ii) that the burden was also on the respondent and which was not discharged '*to show why the decision of the Bar Council to call for the general meeting was ultra vires*' the LPA; and
- (iii) that the '*ultra vires point was not considered at all by the learned judge; and there being no cross-appeal against the decision of the High Court, that issue does not arise*'. **B**

[42] Mr DP Vijandran on the issue of ultra vires in respect of both Appeal 75 and Appeal 521, though not raised in the latter, submitted that the case of the respondent is not about the Judiciary but about the Bar Council and the ambits of its powers under the LPA, specifically on sub-s 41(1)(a) to (e) and (g) thereof. And he also contended that the Bar Council and the Malaysian Bar are creatures of statute, that is, the LPA, hence their actions must therefore be in conformity with the statutory provisions. In particular it was argued that s 42 of the LPA could not be relied upon to justify the convening of the proposed EGM and the proposed general meeting. **C**

[43] In summary, Mr Vijandran contended that the proposed EGM and the proposed general meeting would be ultra vires the LPA in that: **D**

- (a) the LPA does not empower the holding of the proposed EGM;
- (b) the proposed EGM breaches specific provisions of the LPA;
- (c) the proposed EGM is unconstitutional, illegal and void; **E**
- (d) the proposed EGM constitutes contempt and expose '*Bar members to committal for contempt and expenditure of funds to defend against committal proceedings*'; and
- (e) the proposed EGM exposes the Bar and its members to charges under the Sedition Act. **F**

[44] Despite Raja Aziz having expressed his preference to have the issues of contempt and sedition dealt with separately Mr Vijandran nevertheless emphasized that in raising the issues of contempt and sedition the thrust of the respondent's case is not 'to establish illegality per se but to establish the ultra vires nature' of the proposed EGM and the proposed general meeting. And he listed the implications arising from the proposed resolution of 12 October 1999 in that: **G**

- (a) the words used therein would have the effect of undermining the integrity, independence and competence of the judiciary; **H**
- (b) it expressed no confidence in the judiciary; and
- (c) it called for Royal Commission of Inquiry into the judiciary. **I**

[45] Learned counsel submitted that each of the above implications could constitute contempt.

- A** [46] On the issue of sedition it was the contention of Mr Vijandran that the proposed EGM and the proposed general meeting would contravene s 3(1)(c) of the Sedition Act 1948 in that it has a 'seditious tendency ... (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State'. Furthermore judges are appointees of the
- B** Yang DiPertuan Agong. Hence the purpose of the proposed EGM and the proposed general meeting is to arraign His Majesty's judges and that would tantamount to questioning the appointing authority of the King.

- C** [47] Mr Vijandran also submitted that the proposed general meeting and the proposed EGM which included the call for the appointment of a Royal Commission of Inquiry would be unconstitutional hence ultra vires the LPA in view of arts 125 and 127 of the Constitution.

(ii) The finding of the High Court

- D** [48] In respect of the first suit the learned judge, having heard the witnesses called and the submissions of learned counsel for the parties and after examining the materials before him, made the following findings, inter alia:

- E** (a) that serious allegations of impropriety were made against certain members of the judiciary as contained in the notice of 12 October 1999 and the proposed resolution of 12 October 1999 yet the Bar Council and the Malaysian Bar did not take any responsibility to determine whether such allegations were factual. Instead they were indifferent to their truth;
- F** (b) that the Bar Council and the Malaysian Bar are creatures of statute, that is the LPA. Hence it is therefore imperative that they recognize this fact and act with concern when making statements due to their unique positions;
- G** (c) that sub-s 42(1)(d) of the LPA confines the Bar Council and the Malaysian Bar to express their views on matters affecting the administration of law '*only if requested so to do*';
- (d) that the Bar Council and the Malaysian Bar have no power to discuss the conduct of judges and any attempt to do so would be contrary to art 127 of the Constitution; and
- H** (e) that the call for the setting up of a Royal Commission of Inquiry is clearly contrary to Art 125 of the Constitution which *provides* for the mode of removal of a judge.

(iii) The finding of this court

- I** [49] In view of the stand adopted by Raja Aziz and in order to avoid unnecessary confusion in the sequence of our reasons we will consider the issues of contempt and sedition separately from the issue of ultra vires.

[50] From the submissions of Raja Aziz it would appear that the ground relied upon for the convening of the proposed EGM and the proposed general meeting was on the rationale 'that members of the Bar and judges are each an integral part of the proper administration of justice'. And he went on to argue that it should be for the respondent to show why the Bar Council and the Malaysian Bar could not convene those proposed meetings.

[51] We note that the issue of *ultra vires* was also submitted during the hearing of the application for an interlocutory injunction in relation to the first suit. In his judgment when allowing the application the learned judge said, *inter alia*:

'It would seem, from a perusal of the LPA that each of these sub-paragraphs is based on s 41(1)(a), (e) and (g) respectively of the LPA. To my mind none of these sub-sections can be said to provide the defendants with a right to propose the resolutions in question. In fact sub-para (e) seems to cast upon the defendants the duty to ensure that they conduct themselves 'in any proper manner'. In my judgment acting *ultra vires* the provisions, namely, to by-pass art 125 of the Federal Constitution and to call for a Royal Commission of Inquiry clearly does not fall within any of the objects and powers conferred upon the Bar pursuant to s 42 of the LPA. In fact with regard to sub-para (e) far from protecting the members' interest the defendants are exposing their members to possible charges of contempt and sedition. If the defendants cannot slot their case within any of the provisions of s 42, then clearly their conduct is *ultra vires*. Obviously the plaintiff being a member of the 3rd defendant has a right to act to sue to restrain the defendants from committing an act which is *ultra vires*.' (See *Raja Segaran a/l Krishnan v Bar Council Malaysia & Ors* [2000] 1 MLJ 1 at p 24).

[52] On appeal against the granting of the interlocutory injunction a differently constituted panel of this court agreed with the conclusion of the learned judge and went on to say this, *inter alia*:

The respondent also argued that the proposed EGM and the proposed resolution are *ultra vires* the powers conferred to the appellants pursuant to the Legal Profession Act 1976 (LPA). The learned judge agreed with the respondent. He stated his reasons for agreeing so. He cited authorities that go to support his conclusions. We find that the learned judge had not erred in law and facts on this '*ultra vires*' issue. We would, however, go a step further to say that this act of the Bar in trying to convene the EGM to discuss that proposed resolution is in fact an illegality. This is because the LPA does not contain any provisions to enable them to do that act. And Article 127 of the Federal Constitution clearly empowers the Parliament to discuss the conduct of judges.' (See *Rayuan Sivil No W-02-47 Tahun 2000* and *Rayuan Sivil No W-02-48-Tahun 2000*).

[53] We have no reason to disagree with the above views. However lest we might be misunderstood, we are not saying for a moment that we consider ourselves necessarily bound by a decision of another panel of this court even on a same issue.

- A** [54] Having given our serious consideration to the opposing arguments submitted on the issue of ultra vires we are of the opinion that there is much force in the contention that being creatures of statute the Bar Council and the Malaysian Bar must act and conduct their affairs within the framework of the LPA. Acts or conducts beyond its parameters would be ultra vires. Hence in
- B** convening the proposed EGM and the proposed general meeting the Bar Council and the Malaysian Bar must be able to satisfy the court that they were acting within the ambit of the LPA. From the judgment of the learned judge it is obvious that they failed to do so. Thus, we have no reason to disagree with such conclusion.
- C** [55] Specifically we agree that the convening of the proposed EGM and the proposed general meeting does not meet the requirements of sub-s 42(1)(d) of the LPA which reads:
- D** (d) where requested so to do, to express its view on matters affecting legislation and the administration and practice of the law in Malaysia.
- [56] There was no evidence adduced during the trial in respect of the first suit that there was a request from any quarters for the Bar Council or the Malaysian Bar as a statutory body to express their views or to act or conduct as they did. We do not think the Bar Council and the Malaysian Bar can legally
- E** be entitled to say that they have the right or even the privilege to act or conduct as they did notwithstanding the constraints in the LPA. And we cannot agree that the sub-section is ambiguous. As to who should request for their views is of course another issue but surely it has to come from a relevant and proper authority and not from any busybody.
- F**
- [57] We have no doubt in the rationale of the general principle of law pertaining to the role of the Bar in the administration of justice as submitted by Raja Aziz. But as stated earlier the Bar Council and the Malaysian Bar are creatures of the LPA and as such they must act and conduct their activities
- G** within the four corners of the statute. That is a settled law applicable to any legal personality. (See: *Malaysia Shipyard v Bank Rakyat* [1985] 2 CLJ 427). And in *DP Vijandran v Majlis Peguam* [1995] 3 MLJ 576 this court said at p 593:
- H** The Bar Council is a creature of statute. It has only those powers that are conferred upon it by the LPA. Whenever its actions are challenged, the onus lies upon it to demonstrate under what provision of the LPA it purports to act.
- As a creation of statute, the Bar Council has been conferred with certain powers to manage and administer its affairs. These are all general in nature and they are to be found in Pt V of the LPA, and more particularly in ss 56 and 57 thereof. As was put to counsel in the course of argument, ss 56 and 57 of the LPA are to the Bar Council what a memorandum of association is to a limited company — nothing less, nothing more.
- I**

[58] We are also inclined to accept the view of this Court expressed in relation to the appeal against the granting of the interlocutory injunction in respect of the first suit and reproduced herein. In particular we accept the argument that the act or conduct in convening the proposed EGM and the proposed general meeting would be contrary to or undermine the purposes of arts 125 and 127 of the Constitution. If such act or conduct of the Bar Council and the Malaysian Bar were unconstitutional to begin with the inevitable conclusion is that they are ultra vires the LPA. It cannot be said or even imagined that the LPA permits an unconstitutional act or conduct of its creatures.

[59] Sub-section 41(1)(a), (d), (e) and (g) of the LPA read:

42 Object and powers of the Bar

- (1) The purpose of the Malaysian Bar shall be —
- (a) to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour;
 - (b) ... ;
 - (c) ... ;
 - (d) where requested so to do, to express its view on matters affecting legislation and the administration and practice of the law in Malaysia;
 - (e) to represent, protect and assist members of the legal profession in Malaysia and to promote in any proper manner the interests of the legal profession in Malaysia;
 - (f) ... ;
 - (g) to protect and assist the public in all matters touching ancillary or incidental to the law.

[60] Raja Aziz did not dwell much on the scope of the above. However, we agree with Mr Vijandran that the act or conduct of the Bar Council and the Malaysian Bar in proposing to convene the proposed EGM and the proposed general meeting could not be within any of the sub-paragraphs. For instance sub-para (a) refers ‘to uphold the cause of justice’ which would cover a situation where an advocate and solicitor being an officer of the court is duty-bound to inform a client of a court order and the knowledge of the advocate and solicitor acting for the client would be imputed to the client. (See: *Tan Ah Chin & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633). The learned judge in his judgment when allowing an application for an interlocutory injunction in relation to the first suit held that sub-para (e) would appear to cast upon the Bar Council and the Malaysian Bar the duty to ensure that they conduct themselves ‘in any proper manner’. However by-passing art 125 of the Constitution and calling for a Royal Commission of Inquiry were ruled by the learned judge to be a conduct not in any proper manner and ultra vires the sub-paragraph. (see: *Raja Segaran a/l Krishnan v Bar Council Malaysia & Ors* [2000] 1 MLJ 1 at p 24). We are inclined to agree with such view.

- A** [61] In our opinion it is inconceivable to say that the proposed EGM and the proposed general meeting would be upholding the cause of justice or to protect the public in matters touching or incidental to the law when the nett effect is to 'censure' the judiciary while permitting discussion on the conduct of His Majesty's judges in flagrant disregard to arts 125 and 127 of the Constitution. There is much to say in support of the wisdom of Art 127.

- B** [62] Allowing an open discussion on conduct of His Majesty's judges could amount to questioning the wisdom of the King in his selection. Further the Judiciary thrives on the public confidence in the system. Openly criticizing the Judiciary could bring about public misunderstanding of the system and would then produce unwarranted public misgivings. If that is not undermining the system we do not know what is. And we are inclined to agree with the learned judge that the acts of the Bar Council and the Malaysian Bar could not be described otherwise than being unconstitutional. Surely it must not have been the intention of Parliament when it promulgated the LPA from which the Bar Council and the Malaysian Bar evolved that the same bodies would act contrary to the intent of the legislation and the Constitution. Indeed there is much to say in support as was also indicated in the earlier judgment of this Court of what the learned judge in *C Ravichandran Iyer v Justice AM Bhattacharjee & Ors* [1995] 5 SCC 457 at p 472 said:

- E** In other words, the Constitution does not permit any action by any agency other than the initiation of the action under Article 124(4) by Parliament.

...

- F** By necessary implication, no other forum or fora or platform is available for discussion of the conduct of Judge in the discharge of his duties as a Judge of the Supreme Court or the High Court, much less a Bar Council or group of practising advocates. They are prohibited to discuss the conduct of a Judge in the discharge of his duties or to pass any resolution in that behalf ...

- G** [63] Hence, we find no merit in the contentions of the appellants on the issue of ultra vires and in law we cannot fault the learned judge when he allowed the relief sought for in respect of the first suit, namely, 'a Declaration that the said EGM and the said proposed resolution are ultra vires the Legal Profession Act 1976'.

- H** [64] And for completeness we note that in respect of Appeal 521 it is common ground that the issue of ultra vires did not appear to have a role in the mind of the learned judge when he allowed the application. Nevertheless, we are of the mind that our views on the issue in respect of Appeal 75 are equally applicable and we so hold. The correctness on the grant of the interlocutory injunction is another issue which we will deal later.
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Contempt

[65] We have already summarized hereinabove the argument of Mr Vijandran on the issue of contempt. To recap he submitted, inter alia, that if the convening of the proposed EGM could amount to contempt of court then the act or conduct of the Bar Council and the Malaysian Bar in convening it must be ruled ultra vires. Learned counsel then proceeded to show how such act or conduct could amount to contempt of court.

[66] Raja Aziz addressed the issue by questioning the locus standi of the respondent in raising it. He complained that the learned judge relied on the facts of the cases cited instead of applying the legal principles. In addition learned counsel contended that in coming to his finding of contempt the learned judge failed to consider several questions, namely, whether it was even more crucial to maintain the independence and impartiality of the judiciary in that judges whether individually and collectively must strive to enhance and maintain confidence in the judicial system; whether the decision of the Bar Council and the Malaysian Bar to convene the proposed EGM and the proposed general meeting was consistent with their role as equal partner of the judiciary in the proper administration of justice, having regard to the serious allegations of impropriety made and whether the allegations made against the then Chief Justice as stated in sub-para 7(b) hereinabove merited looking into. Learned counsel also submitted that the learned judge erred in subjecting to close scrutiny the notice of 12 October 1999 issued by the Bar Council in connection with the proposed EGM and then making a finding that it was the Bar Council that was undermining the public confidence in the judiciary.

[67] Hence, the question for us to consider is whether the learned judge was correct in his finding in respect of contempt of court being committed if the proposed EGM were to proceed. And although the issue was not raised in the interlocutory application under the second suit our determination on the issue would equally apply if necessary.

[68] In coming to his finding (see *Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors* [2004] 1 MLJ 34 para 30) the learned judge referred to some of the cases cited by learned counsel for the respondent in submission, namely, *Attorney-General v Fred Zimmerman & Ors* [1986] 2 MLJ 89 and *Gallagher v Durack* [1983] 57 ALJR 191.

[69] In the first case it was the view of the Singapore High Court that certain statements made in the *'The Asian Wall Street Journal'* were irresponsible and offensive 'statements calculated to bring the Judiciary of Singapore into contempt or to lower its authority. The statements in so many words question the integrity and impartiality of the courts. The outrageous allegation made in them is that our courts are not independent, that they do not decide on the evidence, the law and the arguments openly placed before them, and that they are influenced by outside considerations, in particular that the courts can be dictated to by the Government. The statements are clearly

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A calculated to undermine public confidence in the proper functioning of our courts.

B [70] ... In the context of these proceedings, anyone who attacks the integrity or impartiality of a court or a judge commits contempt of court. The reason is simple. It undermines public confidence in the administration of justice.’ per Sinnathuray J at p 91. With respect we see no reason why the learned judge should not be allowed to draw a parallel finding in the case before him. We are therefore unable to agree with Raja Aziz that the learned judge erred in only applying the facts of those cases instead of the principles therein. After all what amounts to contempt of court in this country is also very much a question of fact and guided by common law principles. (see *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd* [2002] 4 MLJ 241).

C [71] In ruling that the notice of 12 October 1999 and the proposed resolution of 12 October 1999 were contemptuous the learned judge said, inter alia (see *Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors* [2004] 1 MLJ 34):

D With regard to 1(a) of the Notice, counsel argued that the first defendant was transgressing the very essence thereof by acting *ultra vires* the LPA. Whilst agreeing with the contents of 1(b) he likened 1(c) to Brutus stabbing Caesar. His interpretation of 1(c) was that if the judiciary is to be what it is to be, then what it needs is independence, integrity and competence.

E [25] But 2(a) Mr Vijandran says, is the stab by Brutus. In a glib statement worthy of crafty lawyership he alleges that the Bar had descended into a nebulous and uncertain position by using the word ‘understands’.

F [26] To my mind, the language used seems to suggest that it was a fact that serious allegations of impropriety have been made against certain members of the judiciary. However, by using the word ‘understands’ it was clear that the defendants, whilst insidiously suggesting a fact, yet are not taking responsibility for asserting such a fact.

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[33]... the Malaysian Bar must accept the fact that it is a voice that is heard by the public. It acts as a regulator. It must also act as a moderator.

H [34] Independence of the judiciary is the cornerstone of judicial functions. If this is attacked then the system of administration of justice is destroyed.

...

I [71]... In the case before me, the plaintiff contends that he is a member of the Bar and if the Bar is guilty of contempt or sedition, he too, as a member of the Bar, could be guilty of the same. What the plaintiff is attempting to do is to show that if the meeting is held to consider the Resolution, the participants, including he, can be found guilty of such an offence, and he wants to avoid that.... So long as the

plaintiff has shown that he has the locus to make the application and so long as he can show that the conduct of the defendants is such as to put him, the plaintiff, in peril of such similar prosecution that the defendants could face if the defendants' act is allowed to be consummated, the plaintiff need not wait to see the outcome, before acting. To protect his own interest he can take out an injunction to restrain the defendants and if the court is satisfied that the act complained of could give rise to the plaintiff facing criminal prosecution, the plaintiff ought to be allowed to use injunctive measures to stop the defendants.

[72] With respect we find the learned judge's approach on the issue to be correct in law and in fact.

[73] As to the argument that there were more serious questions to consider relating to the need to protect the independence of the Judiciary and not to be preoccupied with the words used in the notice of 12 October 1999 and the proposed resolution of 12 October 1999, with respect, we are unable to agree. We have already stated our reasons for agreeing with the contention that the convening of the proposed EGM was ultra vires the LPA. In short the Bar Council and the Malaysian Bar, as statutory bodies, had gone beyond the purpose of their incorporation.

[74] Accordingly we find no reason to differ from the learned judge in his finding on contempt and we would say that this conclusion applies to both Appeal 75 and Appeal 521.

[75] We note that earlier on this court in its unreported judgment when dealing with the appeal against the grant of the interlocutory injunction in respect of the first suit had said this (See: Rayuan Sivil No W-02-47 Tahun 2000 and Rayuan Sivil No W-02-48 Tahun 2000):

The learned judge then proceeded to consider whether the preambles and the resolution 'constitute possible contempt'. For this, he referred to several cases from India, Singapore and Australia and then concluded thus:

To my mind such utterances as contained in the resolution are clearly contemptuous. It is obviously an attempt to erode public confidence in the Judiciary ...

We agree with the learned judge.

[76] And after referring to the following cases, namely, *Brahma Prakash v State of UP AIR* (1954) SC 10; *Advocate General v D Seshagiri Rao AIR* (1966) Andhra Pradesh 167 and *Crown v A Rafique & Ors IR* (37) 1950 Sind 1 the judgment concluded:

We referred to the three above-mentioned cases as we feel that they would further support the correctness of the learned judge's conclusion that the resolution is clearly contemptuous. We would also stress that *Seshagiri Rao's* case (*supra*) also held that in a proceeding for contempt the truth of the imputations is no defence at all.

A [77] With respect we have no reason to disagree with the views expressed therein.

[78] Hence, we are not persuaded by the submissions advanced for the appellants and we find that the learned judge was not in error when he granted in respect of the first suit ‘a Declaration that the said EGM and the said proposed resolution constitute contempt of Court.’

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Sedition

[79] On the issue of sedition the learned judge said (see *Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors* [2004] 1 MLJ 34 para 66):

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I have thoroughly discussed this heading in my earlier judgment (see *Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors* [2000] 1 MLJ 1 at p 25). The unreported judgment of the Court of Appeal upheld my earlier views.

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[80] And in that earlier judgment (see *Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors* [2000] 1 MLJ 1 at p 25) when allowing the application by the respondent for an interlocutory injunction the learned judge said:

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The conduct of the defendants and the members of the third defendant if allowed to attend the EGM and to discuss the resolutions would appear to constitute an offence under s 4(1)(a) read together with s 3(1)(c) of the Sedition Act 1948. However, it is not my duty to make any finding as to whether an offence has or has not been committed under the said sections. This is for the Public Prosecutor to decide, if at all. In any event, it is my judgment that the plaintiff in actual fact is protecting the defendants from plunging into an abyss from which they cannot emerge unscathed.

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[81] This court in its unreported judgment upheld the view of the learned judge with these words (see Rayuan Sivil No W-02-47 Tahun 2000 and Rayuan Sivil No W-02-48 Tahun 2000):

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As regards the respondent’s view that ‘the holding of the said EGM and/or the adoption of the said resolution would also constitute an offence under ss 3(1)(c) and 4(1)(a) of the Sedition Act 1948, we are of the opinion that the wordings of both the sections are so simple and clear that no reasonable man could ever disagree with the respondent’s view.

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[82] We have already noted hereinabove the points submitted by Mr Vijandran on the issue.

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[83] Raja Aziz in his submission on the issue questioned the standing of the respondent. Sedition being a crime it was his contention that only the Attorney-General who could assert public rights and who could represent public interest but not the respondent.

[84] Leaving aside the issue of locus standi which we will deal in greater detail later, it is our view that the short answer to the query of Raja Aziz is found in the final judgment of the learned judge when he said:

... so long as he can show that the conduct of the defendants is such as to put him, the plaintiff, in peril of such similar prosecution that the defendants could face if the defendants' act is allowed to be consummated, the plaintiff need not wait to see the outcome, before acting. To protect his own interest he can take out an injunction to restrain the defendants and if the court is satisfied that the act complained of could give rise to the plaintiff facing criminal prosecution, the plaintiff ought to be allowed to use injunctive measures to stop the defendants.

[85] Further, we are in agreement with the view expressed by this court on the issue and reproduced hereinabove.

[86] Thus, we find no merit in the grounds of appeal of the appellants and it is our judgment that the learned judge in respect of the first suit was correct in law when he allowed a 'Declaration that the said EGM and the said proposed resolution constitute offences under the Sedition Act 1948.' And to remove any doubt our conclusion equally applies to Appeal 521.

Locus standi

[87] On the issue of locus standi the argument marshalled for the appellants is that the respondent did not have substantive locus standi since it is the Attorney-General alone who can institute criminal proceedings. This point was brought up in relation to the contention by the respondent that to allow the proposed EGM and the proposed general meeting to proceed would be contemptuous and seditious and ultimately would expose him to possible criminal prosecution.

[88] It was also further asserted for the appellants that the respondent failed to show (threshold locus standi) that he would suffer special injury distinct from any possible injury that might be suffered by the rest of the members of the Malaysian Bar if the proposed EGM and proposed general meeting were to go ahead. Considerable reliance was placed upon the following cases: *Gouriet v Union of Post Office Workers* [1978] LR 435; *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & Other Appeals* [1997] 3 MLJ 23 CA and *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12.

[89] Mr Vijandran replied that the principle in *Gouriet* was not relevant to the facts of the present suits. Alternatively, he submitted that even if applicable the exceptions therein apply.

[90] In elaborating why *Gouriet* was not applicable Mr Vijandran listed the distinguishing factors, namely,;

- (a) that *Gouriet* was not a member of the Postal Union but just an ordinary member of the public;
- (b) that *Gouriet* did not allege special damage to him; and
- (c) that *Gouriet's* principle does not apply where an application for an injunction is by a member of a statutory body who seek to restrain ultra

A vires acts of the corporation notwithstanding the same acts may also be illegal and/or criminal.

[91] Learned counsel went on to say that in the instant appeals the respondent is a member of a statutory body, that is, the Malaysian Bar and thus entitled to restrain such body from ultra vires acts even if those acts are also criminal offences. A series of decided cases were then cited to support such a proposition, inter alia: *Simpson v Westminster Palace Hotel Co* (1860) 8 HL Cas 712; *Powell v Kempton Park Racecourse* (1897) 2 QB 242; *Hoole v Great Western Railway* (1867) 3 Ch App 262; *Jenkin v Pharmaceutical Society of Great Britain* (1921) 1 Ch D 392; *Bermuda Cablevision Ltd. v Colica Trust Co Ltd* (PC) [1998] AC 198; *Bateman's Bay Local Aboriginal Land Council and Another v Aboriginal Community Benefit Fund Pty Ltd and Anor* 155 ALR 684.

[92] Upon reading the judgment of the learned judge we would observe that he found locus standi for the respondent on the basis that:

D So long as the plaintiff has shown that he has the locus to make the application and so long as he can show that the conduct of the defendants is such as to put him, the plaintiff, in peril of such similar prosecution that the defendants could face if the defendants' act is allowed to be consummated, the plaintiff need not wait to see the outcome, before acting. To protect his own interest he can take out an injunction to restrain the defendants and if the court is satisfied that the act complained of could give rise to the plaintiff facing criminal prosecution, the plaintiff ought to be allowed to use injunctive measures to stop the defendants.

[93] And in the earlier judgment of this Court on the issue (see: Rayuan Sivil No W-02-47 Tahun 2000 and Rayuan Sivil No W-02-48 Tahun 2000) and which the learned judge referred to in his judgment, the view was expressed in this fashion:

G In the appeal before us, the respondent, as contended by the learned respondent's counsel, brought the action as a member of the Malaysian Bar and not as an ordinary member of the public. The EGM and the resolution expose Bar members (which include the respondent) to proceedings for contempt and to charges under the Sedition Act and consequently expenditure of funds to defend the proceedings and the charges. On the basis of these facts, we feel that *Gouriet's* case is distinguishable and as the learned respondent's counsel contended, is not relevant to the appeal before us. Assuming that we are wrong here, we are of the view that the respondent had complied with the principles in *Gouriet's* case. Lord Diplock in *Inland Revenue Commissioners v National Federation of Self-employed & Small Businesses Ltd* [1982] Advocate and Solicitor AC 617 at p 638 said:

I 'As respects the claim for a declaration considerable reliance was placed upon the recent decision of this House in *Gouriet v Union of Post Office Workers* (1978) AC 435, which held that a private citizen, except as relator in an action brought by the Attorney-General, had no *locus standi* in private law as plaintiff in a civil action to obtain either an injunction to restrain another private citizen (*in casu*, a trade union) from committing a public wrong by breaking the criminal law, or a

declaration that his conduct is unlawful, *unless the plaintiff can show that some legal or equitable right of his own has been infringed or that he will sustain some special damage over and above that suffered by the general public.*

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We are satisfied that the respondent, as a Bar member, 'will sustain some special damage over and above that suffered by the general public' if the injunction is not issued. It must at this juncture, be not forgotten that the respondent is a paying member of the Bar and payments are compulsory. He certainly has an interest in ensuring that the Bar does not involve itself in illegal activities or *ultra vires* acts.

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[94] There is no doubt that the doctrine of locus standi is far from settled. That was also the view of this Court in *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajiing Tubek & Ors And Other Appeals* (supra). Thus, accepting for a moment the present incoherent nature of the doctrine, there is much force in what Mr Vijandran has submitted, that is, whether a member has the right to restrain a corporation from doing *ultra vires* acts. Incidentally from the excerpt hereinabove of the earlier judgment of this Court that question appears to have been answered in the affirmative. And we agree. The element of being a member of a statutory body is vital to come to such conclusion. The question of special damage in such situation plays a minor role.

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[95] Anyway the above principle is not novel. In *Jenkin v Phamaceutical Society of Great Britain* (supra) it was ruled that at common law a member of a society incorporated by Royal Charter is entitled to ask for an injunction to restrain the commission by the society of acts which are outside of the scope of the Charter and which might result in the forfeiture of the Charter and the destruction of the society. And quite recently that principle was referred to in the case of *Bermuda Cablevision Ltd v Colica Trust Co Ltd* (supra) where Lord Steyn delivering the opinion of the Privy Council said this p 210:

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In a company law context a closer analogy than *Gouriet v Union of Post Office Workers* [1978] AC 435 and *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 is provided by the case of a company incorporated by Royal Charter. It has been held at common law that a member of such a society is entitled to an order restraining the commission of acts outside the scope of the charter which may result in the forfeiture of the charter and the destruction of the society: see *Jenkin v Phamaceutical Society of Great Britain* [1921] 1 Ch 392, *Dickson v Phamaceutical Society of Great Britain* [1970] AC 403. That is not altogether dissimilar from the complaint of Colica that the unlawful carrying on of business by Cablevision puts at risk the licence which is the lifeblood of Cablevision. But their Lordships would not press this analogy too far and would decide this point on a broader basis.

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[96] Accordingly we agree with Mr Vijandran that the strict application of the principle in *Gouriet* (supra) does not arise in view of the facts and circumstances of the instant appeals before us.

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A [97] We are also unable to agree that the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & Other Appeals* (supra) should be applied. As in *Gouriet* the respondent there was not a member of a statutory body or corporation seeking to prevent ultra vires acts.

B [98] To recap the respondent is a member of the Malaysian Bar and all he is asking is for this statutory body not to act beyond its statutory powers and duties. And premised on our concurrence that the proposed resolution of 12 October 1999, the holding of the proposed EGM and the proposed general meeting were ultra vires the LPA the question of locus standi of the respondent should not arise. It follows that there is no question of the civil court being asked to enforce any criminal law.

C [99] In any event it is also our opinion that the respondent had satisfied the 'special damage' test. Being a member of the Malaysian Bar he would definitely have been exposed to potential prosecution for sedition and contempt had the proposed EGM and the general meeting proceeded. The fact that he was only one of the many members should not negate his standing to sue on his own to ensure that he would not be exposed to unnecessary legal complexities. (see: *Bateman's Bay Local Aboriginal Land Council and Anor v Aboriginal Community Benefit Fund Pty Ltd and Anor* 155 ALR 684).

D [100] In view of our above conclusions on the main issues, initially, we were not inclined to consider the other aspect of the complaint of the appellants in this appeal. However on further perusal we think we need to address it since Appeal 521 deals with the grant of an interlocutory injunction by the learned judge. In other words, was the learned judge correct when he allowed the application?

E [101] Mr Vijandran in arguing for Appeal 521 advanced his first contention in that the learned judge was correct in granting the interlocutory injunction on the basis of one particular issue. Learned counsel submitted that the learned judge was right in his approach by first seeking clarification from the appellants on the authenticity of the statements attributed to Dato' Dr Rais Yatim and the then Chief Justice. And he went on to argue that since the appellants informed the learned judge that they were not concerned with the truth and in view of the legal implication arising from those statements in the context of the decision in *C Ravichandran Iyer* (supra) which was followed by this court in its judgment in Rayuan Sivil No W-02-47 Tahun 2000 and Rayuan Sivil No W-02-48 Tahun 2000 there was sufficient basis, even on a singular issue, to grant the interlocutory injunction.

F [102] Mr Vijandran further submitted that the usual 'principles' guiding judges in considering applications for interlocutory injunction were not cast

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aside. He said that in exercising his discretion the learned judge considered the strong case established by the respondent premised on the unverified statements relied upon by the appellants to call for the proposed general meeting. On that score Mr Vijandran submitted that there was no necessity for the learned judge to deal with every elements of the 'principles' as enunciated in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504. And in any event learned counsel contended that the appellants did not challenge that the balance of convenience tilted in favour of the respondent bearing in mind the irreparable damages that could arise if the proposed general meeting were to proceed solely on the allegations contained in the unverified statements. Thus according to learned counsel there was no question of the learned judge having shifted the burden of proof when considering the application.

[103] It was the grounds of appeal of the appellants that the learned judge did not go into the merits of the application and granted the interlocutory injunction based on preliminary point.

[104] Now, the law on the grant or refusal of an interim injunction is clear. It involves the exercise of discretion. As to the mode of exercise pointers have been made as for instance in the case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 where it was outlined thus:

To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:

- (1) he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;
- (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief.

- A** Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and
- B**
- (3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion'—per Gopal Sri Ram JCA at p 206.
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- E** [105] The question to ask therefore is: whether the learned judge failed to observe any of the guidelines above before granting the interlocutory injunction?
- F** [106] In his judgment the learned judge after dismissing the preliminary objections raised by the appellants went on to consider the basis of the allegations upon which the appellants relied on to call for the proposed general meeting. And he concluded thus:
- G** Is not this condemning a person even without hearing that person. If the Malaysian Bar is not concerned with the truth or otherwise of the allegations but want to have this meeting only to satiate their hunger for a public debate over the chief justice by wresting the discussion from the general public and by so doing trying to show that they are protecting the sanctity of the judiciary, it seems to me that this effort is totally misconceived. To my mind there is no basis to call for an extraordinary general meeting on allegations attributed to someone who has not even been asked to verify its truth. There is no need for me to ask the plaintiff to even go into the merits of his application. On this one basic preliminary issue alone the 1st defendant has been unable to satisfy me. I therefore grant the plaintiff an order... .
- H**
- I** [107] At first blush the manner in which the learned judge came to his conclusion appears to be inadequate. And it could have avoided unnecessary argument if he had laid down properly his analysis of the issues before him. But we hasten to add that there is no strict requirement that such analysis must be systematic and perhaps erudite. Hence, in the instant appeal having read the judgment of the learned judge as a whole we do not think it can be

disputed that he did acknowledge there were serious issues to be tried such as whether the allegations were true or plain hearsay, whether there was any basis to call for the suspension of the then Chief Justice and the consequence of the acts of the appellants. And such trend of thought could be gleaned from his judgment albeit obliquely when he said:

‘It seems to me that whilst the Malaysian bar is making a serious allegation by calling for the suspension of the chief justice or for his removal, they are prepared to do so on mere unsupported allegations without even giving any thought to the principle of natural justice by seeking confirmation from Datuk Dr Rais Yatim if the contents of the report as contained in the newspaper cutting as attributed to him were actually spoken by him.’

[108] And in our view the learned judge did consider where the justice of the case should lie. He took into account public interest as well. In fact he balanced the damage that could arise if the proposed general meeting was held and the basis for its calling by referring to the decision in *C Ravichandran Iyer*.

[109] As regards damages it was contended for the appellants that expenses went to waste due to the grant of the interlocutory injunction. In our view no one should be blamed other than the appellants themselves. We agree with the learned judge when he said:

‘The bar council in its public statement on the proposed general meeting of the bar said ‘the bar as the natural friends, protectors and guardians of the sanctity of the judiciary is left with no option but to examine the whole matter and proposed solutions at a general meeting’. It seems paradoxical that having proclaimed itself as the friend, protector and guardian of the sanctity of the judiciary, the Malaysian bar has totally ignored the basic precept of failing in its duty to listen to the other side. It listened albeit to unsupported statements allegedly attributed to the minister in the Prime Minister’s Department and it rushed head on with its avowed aim of calling a meeting to discuss publicly no doubt within its confines, the conduct and behaviour of the highest official of the judiciary. Yet whilst pretending to protect the sanctity of the judiciary, it did not accord the chief justice the right to be heard before they even thought of convening this meeting.’

[110] Accordingly as a whole we do not think we can plainly say that the learned judge exercised his discretion erroneously given the circumstances of the case. We are therefore not prepared to interfere as it does not warrant our interference.

Conclusion For Appeals 75 And 521

[111] We find therefore no merit in any of the complaints raised in these main appeals and hence we dismiss them.

Recusal — Appeal 512

A [112] This point comes under Appeal 512 which is an appeal against the decision of the learned judge dismissing a preliminary objection raised in connection with the application for interlocutory injunction under the second suit.

B [113] The thrust of the contention of the appellants is twofold. Firstly, that the learned judge should have recused from hearing the application since he had already made a decision on the same or very similar issues in the first suit, that is related to Appeal 75 herein and secondly that the same Judge had earlier on heard and dismissed an application to amend the pleadings in another unrelated suit and which proposed amendment was subsequently incorporated into the defence in the first suit.

C [114] In other words it was the appellants' complaint that the learned judge should have not proceeded to hear the application for interlocutory injunction under the second suit since he had already decided on the same or very similar points in another suit between the same parties. Mr Loh for the appellants went on to point out the similarities in the relief sought for in the first and second suits to substantiate his argument.

D [115] And it is also the submission of Mr Loh that this recusal point should not be relegated as mere academic issue since neither the supporting facts nor the substratum of the litigation giving rise to the issue have vanished nor ceased to exist. Further he submitted that the parties are still very much affected by the outcome of any decision, the costs remains at large, the parties are still very interested in the issue and a decision on the issue does not merely serve as an obiter in relation to the error of an earlier decision.

E [116] Mr Vijandran gave quite a short answer to this complaint. He did not deal with the contention that the issue had become academic and we think rightly so. Instead he submitted that the appellants had it all wrong as to the facts of the suits referred to. He began by pointing out that in the memorandum of appeal the reference to the case No S2-23-42 of 1996 by learned counsel for the appellants had nothing to do with the respondent or the first suit. Hence learned counsel argued that there was no ground for the submission of learned counsel for the appellants to sit on.

F [117] Alternatively, Mr Vijandran submitted that there was no basis for the appellants to say that two similar cases were heard by the learned judge. According to learned counsel the facts of the suits referred to were different. And he contended that although the questions of law might be the same or similar, that should not debar the learned judge from hearing the suits.

G [118] In respect of the application to amend pleadings in another unrelated suit which allegations the appellants contended were subsequently incorporated into the defence of the first suit, Mr Vijandran argued that what was before the learned judge then was purely an application to amend and not as to the truth of the allegations.

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[119] We note that the submissions of Dato' Loh on the issue were made with vigour and perhaps conviction. But having deliberated on the diverse arguments before us we are inclined to agree with the submissions of Mr Vijandran. On his first point we are amenable to the view that it could have been just an oversight. Thus nothing turns on that. But there is much force in the alternative contention. Indeed it is clear that the two suits of the respondent were founded on two different sets of facts although the points of law may be similar. And no authority was cited to us enunciating a principle of law that would have been a basis for the learned judge in the instant appeal to recuse from hearing the second suit.

[120] As to the argument that the learned judge had also heard the application to amend the pleadings in another unrelated suit which he then dismissed, we find such argument to be an obvious indication of being plainly averse to the learned judge regardless of the reason. For it is elementary that the criteria to consider in an application to amend pleadings are entirely different. There was also no assertion that the learned judge had ruled on the truth or falsity of the allegations which became part of the defence in the first suit when he was considering the application to amend.

[121] If we were to agree with the contentions of Dato' Loh then we might end up setting a precedent where no judge can hear any two cases with similar issues. That would be stretching too far the principles of law enunciated on when judges and arbiters should recuse from hearing cases. The primary questions to consider should be: whether 'there was a real danger of bias on the part of the learned trial Judge' (see *Mohamed Ezam bin Mohd Nor & Ors v Public Prosecutor* [2002] 1 MLJ 321 FC) and whether the allegation and the factual circumstance could have 'caused a fair-minded and informed bystander to entertain a fear of real danger of bias' — (see *Alor Janggis Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [2002] 4 MLJ 327; *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* [2000] 1 All ER 65). Of course these questions would not be answered fairly by anyone who has a preconceived mind towards any particular judge or arbiter. In this instant appeal we find that the appellants have not succeeded in convincing us that their contentions bear the affirmative answers to those primary questions.

[122] We note that the matter before the learned judge was only an application for an interlocutory injunction. Any allegation of bias may be premature. Indeed this court has opined before that in such a case 'a judge may grant an interlocutory injunction because he finds a particular line of defence taken to be untenable and yet, after hearing all the evidence and detailed argument at the trial, reach the opposite conclusion and dismiss the suit. I cannot help but think that such an occurrence is commonplace in our courts as it is indeed in other jurisdictions' (see *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213).

- A** [123] For the foregoing reasons we find no merit in this instant appeal and we dismiss it.

Secrecy — Appeal 780

- B** [124] This appeal relates to the first suit. It revolves on the interpretation of s 76(2) of the LPA. The appellants are dissatisfied that one Mr R Rajasingam who was then a member of the Bar Council was allowed to be called as a witness by the respondent during the hearing of the first suit and to answer a specific question, that is, whether the motion proposed by the Bar Council was the same as the proposed resolution of 12 October 1999 to be tabled during the proposed EGM.

C [125] Section 76(2) which came into force on 16 December 1983 vide the Legal Profession (Amendment) Act 1983 (Act A567/83) reads:

- D** ‘(2) Except and in so far as may be necessary for the purpose of giving effect to any resolution passed or decision made, secrecy shall be maintained in all proceedings conducted by the Bar Council, the State Bar Committee, the Inquiry Committee and their staff.’

- E** [126] It was the submission of Ms Sreenevasan that the s means what it says, namely, prohibition against disclosure of what transpired during any proceeding conducted by any of the entity referred thereto. And she argued that s 123 of the Evidence Act 1950 (‘the Evidence Act’) should not be applied. She cited the case of *Maju Holdings Sdn Bhd v Kamala Devi a/p Ramadass & Anor And Another Appeal* [2003] 2 MLJ 36. But it should be noted that that case was dealing with secrecy under the Banking and Financial Institutions Act 1989 (‘BAFIA’).

- F** [127] The alternative argument presented was that even if the learned judge was right in relying on the provisions of the Evidence Act he failed to comply with the requirements of the provisions before admitting any evidence through Mr R Rajasingam.

- G** [128] In reply Mr Vijandran submitted that the learned judge was right in his approach on the issue. He argued that s 76(2) of the LPA regulates the interaction between members and should not be extended to court proceeding. He pointed out that that section did not oust the operation of the Evidence Act.

- H** [129] As regards the argument that there was no proper observation of the provisions of the Evidence Act before admitting the documentary evidence, Mr Vijandran said that such point should only be considered if there was any challenge to the relevancy of such documents. Since there was none the argument should fail.

I [130] On this issue the learned judge said:

‘Having gone through the various authorities, I held that it is the *Evidence Act* that determines the admissibility of any *evidence* in a Court of law, and in respect of this case I held that the relevant provisions for consideration ought to be sections 123 and 162(2) of the *Evidence Act* 1950. I also held that there was nothing in the LPA that excluded the application of the *Evidence Act*.

A

I therefore held that the meaning of the word ‘secrecy’ given to s 76(2) of the LPA is that all decisions and discussions or resolutions passed that relate to investigations relating to the conduct or affairs (or complaints) against members of the Bar are the matters that ought to be kept secret to protect the interest of such members, lest the conduct and affairs of members or any complaints against any members be discussed by the Council or Committee members in the open. I rejected the defendants’ request to apply the literal interpretation to the meaning of the word ‘secrecy’.

B

C

[131] With respect the short answer to the complaint of the appellants is found in s 2 of the *Evidence Act* which states:

‘This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.’

D

[132] Hence, unless it is expressly excluded we are of the view that the provisions of the *Evidence Act* apply in any court proceedings. We find no expressed exclusion in s 76(2). Accordingly sections 118 and 136 would have been the provisions in answer to the objection when Mr R Rajasingam was called as a witness. Further there is no provision in the *Evidence Act* which allows a witness to rely on a statutory protection such as contained in s 76(2).

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[133] We find no merit in this appeal and we dismiss it.

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Order 33 — Appeal 647

[134] For this appeal we have already summarized the complaint of the appellants hereinabove.

[135] Mr Vijandran in reply submitted that it was a matter of exercise of discretion by the learned Judge. And he said that the issue as framed took into account the concerns of the appellants and would finally dispose of the action. As regards the calling of witnesses learned counsel argued that the learned judge gave the parties liberty to call witnesses.

G

[136] In his judgment the learned judge ruled, inter alia:

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I am of the view that the plaintiff was perfectly right to move this court under O 33 r 2 of the RHC. The issues and the grounds to back up the application are matters of law and if the defendants contend that they need to call witnesses, I had made an order allowing them to do so. After all since notice to cross-examine on the affidavit can be served to allow for oral *evidence* to be admitted, I did not see anything wrong in allowing the defendants the right to call any witness in support, instead of filing an affidavit ...

I

- A** Therefore where the court is of the view that the issues could be decided without the need for a prolonged trial, the court ought to move under O 33 r 2 to be read with r 5. In respect of the defendants' submission, I hold that where contempt and sedition are concerned, intention or motive is irrelevant and immaterial. Therefore, the defendants' argument that *evidence* must be led to show intention and the motive for calling the EGM and moving the resolution, is no longer meritorious.
- B**

Before I could make a decision, counsel for the 2nd defendant then suggested that the proposed question should be as follows:

- C** That whether the said EGM and the said proposed Resolution constitute contempt of court and whether the said EGM and the said proposed Resolution constitute offences under the Sedition Act 1948 and if the answers to the said two questions are yes then whether the said EGM and the said proposed Resolution are *ultra vires* the LPA 1976?

- D** I took this to mean that the 2nd defendant at least was conceding to the approach taken by the plaintiff in proceeding under O 33 r 2 of the RHC, except that he wished the question to be rephrased as suggested by the 2nd defendant. It was indeed a surprise when I received notification of the appeal.

- E** In any case, I was completely satisfied that this case should proceed under O 33 r 2 read together with r 5

I also ordered that parties, if they wished, be permitted to adduce oral *evidence*; otherwise the case to proceed based on the pleadings, the affidavits filed, and the Agreed Statement of Facts ('B').

- F** [137] First the law. For O 33 of the Rules to apply the issues in a case should be clear and not riddled with complexities and the facts should not be in dispute. 'Where the issues on point of law to be decided involve the consideration of facts, resort to O 33 r 2 is inappropriate. It is undesirable to resolve such issues on a purely hypothetical state of facts' — (see *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474); *Arab Malaysian Finance Bhd v Meridien International Credit Corporation Ltd London* [1993] 3 MLJ 193).
- G**

- H** [138] It appears that the main complaint of learned counsel for the appellants is that O 33 should not have been applied since intention and motive are necessary ingredients before any finding for contempt and sedition can be arrived at. Otherwise there were hardly any disputed facts on the issues to be determined especially with the Agreed Facts 'B' as amended available.

- I** [139] Now, it was held that *mens rea* is not an element that has to be proved to establish contempt. And neither is motive. This view was expressed by this court in *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321. And we reaffirm that view.

[140] Since it is only for the purpose of establishing intention or motive that the appellants might call witnesses we find therefore that the learned judge was right in allowing the invocation of O 33.

[141] Similarly, for sedition the 'intention of the accused when he made the speech and used words which are alleged to be seditious is not material or relevant for it is provided in s 3(3) of the Sedition Act that the intention of the speaker shall be deemed to be irrelevant if in fact the words have a seditious tendency' per Ajaib Singh J (as he then was) in *Public Prosecutor v Oh Keng Seng* [1979] 2 MLJ 174. The then Federal Court affirmed the decision of the High Court. (see *Oh Keng Seng v Public Prosecutor* [1980] 2 MLJ 244).

[142] Accordingly we find no reason to fault the learned judge in proceeding with the hearing of the first suit by way of O 33. Our inevitable conclusion is that this appeal is dismissed as we find no merit in the complaint thereof.

Overall Conclusion

[143] For the reasons given we dismiss these appeals. And since these appeals were filed separately though before us they were heard jointly, it is only appropriate that we allow costs to each of the appeals to be taxed and paid to the respondents. Deposits paid to account for taxed costs.

Appeals dismissed with costs.

Reported by Sugandra Rao

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